

IN THE HIGH COURT OF KENYA

AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS COURT

ELRC. CAUSE NO 851 OF 2016

SAMMY MBUVI.....CLAIMANT

-VERSUS-

SAI OFFICE SUPPLIES LIMITED...RESPONDENT

RULING

1. The application before the court is the Respondent's Notice of Motion dated 3.10.2019. It is mainly brought under section 90 of the Employment Act and it seeks for striking out of the suit herein for being time barred.

2. The application is supported by the affidavit sworn by Grace Wanjiru on 3.10.2019. The main ground upon which the application is that the cause of action herein arose on 17.12.2012 when the claimant was dismissed from employment but the suit was filed on 13.5.2016, more than the 3 years time required to file a suit by dint of section 90 of the Employment Act.

3. The claimant has opposed the application vide his Replying affidavit sworn on 11.10.2019. In brief he contended that the dismissal letter dated 17.12.2012 was never served to him by the respondent until 2015 when he visited the office after the criminal case lodged by the respondent was dismissed by the court. He therefore averred that time started to run from 2015 when the dismissal was communicated to him, and as such the suit is not time barred.

4. There is no dispute that the claimant ceased working for the respondent on 18.12.2012 when he was arrested for alleged theft and arraigned in court. There is further no dispute that the claimant was never paid any salary after the arrest and he never demanded for the same until his criminal case was terminated by the court. The issue for determination is whether the suit herein is time barred.

5. Section 90 of the Employment Act provides that:-

“90. Notwithstanding the provision of section 4(1) of the Limitation of Action Act, no civil action or proceedings based on arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced within 3 years after the act, neglect or default complained or in the case of continuing injury or damage within 12 months next after cessation thereof.”

6. In this case the claimant acknowledged in his pleadings and his written witnesses statement that his employment was terminated by the respondent on or about 18.12.2012 without prior notice on allegation that he had stolen company property. The claimant further confirmed the date of his dismissal through his lawyers demand letter dated 14.4.2016 when he demanded for terminal benefits in respect of his dismissal in December 2012.

7. Considering the pleadings, the documentary evidence on record and the submissions by counsel, I find that the respondent has proved on a balance of probability that the claimant was dismissed from employment in December 2012 upon being suspected of theft. The foregoing is corroborated by the fact that he never reported to work and never received any salary from the respondent from 18.12.2012.

8. From 18.12.2012 when the claimant ceased working, till 13.5.2016 when the suit was filed it is 3 years 5 months. Applying the said facts to the mandatory provisions of section 90 of the Act, the court returns that the suit herein was filed out of time and it is therefore time barred. The corollary to the foregoing is that the court is divested of the jurisdiction to determine the dispute founded on the expired case of action. The cause of action herein expired on 17.12.2015, when 3 years elapsed from the date of the separation.

9. It is now trite that a court downs it stools immediately it finds that it has no jurisdiction to entertain the dispute before it, like in the instant suit.

10. Consequently, I strike the suit herein for being time barred. Each party to bear his/her own costs.

Dated, signed and delivered at Nairobi in open court this 17th day of January, 2020.

ONESMUS MAKAU

JUDGE